Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

SANDRA LEA BENEDICT,

Petitioner,

v.

EAU CLAIRE PUBLIC SCHOOLS, WEAC LABOR UNION, THOMAS GUELZOW, GEORGE SENTENEY, VICTOR ARELLANO, THOMAS ARNOT, and JOHN FINNNERTY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

SANDRA LEA BENEDICT
Pro Se Litigant
3642 Livingston Lane
Eau Claire, Wisconsin 54701
(715) 832-0221

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a party to litigation in a state court where the issue in dispute is whether or not she has discharged her attorney "for cause" entitled to a trial by jury as a matter of due process under the Fourteenth Amendment and the Seventh Amendment to the Constitution of the United States?

II. Whether the decision of the trial court and the court of appeals of Wisconsin denying the Petitioner a jury trial on the factual issues of whether the attorney had "just cause" to discharge himself or his client was clearly contrary to the Constitutions of both Wisconsin and the United States?

III. Whether the trial court abused its discretion and denied Petitioner her Constitutional Right to present a defense when it refused to allow her to present to the jury expert testimony about disabilities that make her particularly susceptible to pressure and coercion, and thus likely to involuntarily and falsely incriminate her regarding lack of disabilities?

IV. Whether the identity of parties liable under section 35.134 Retaliation and Coercion, Section 35.134 implements section 503 of the Americans with Disabilities Act (ADA) and 29 U.S.C. §623(d) which prohibits retaliation against any individual who exercises his or her rights under the Act is an important question of federal law that has not been, but should be, settled by this court.

V. Whether the Seventh Circuit's decision on the scope of liability under section 35.134 Retaliation and Coercion, Section 35.134 implements Section 503 of the Americans with Disabilities Act (ADA), the Rehabilitation Act, 29 U.S.C. §794(a) and 29 U.S.C. §623(d) which prohibits retaliation against any individual who

QUESTIONS PRESENTED FOR REVIEW – Continued

exercises his or her rights under the Act is inconsistent with the intent of Congress, as is reflected by the plain language, structure, and legislative history of the statute.

VI. Whether Federal Jurisdiction for removal of ERD (Equal Rights Division) State Claims to Federal Court Jurisdiction: citation: 28 U.S.C. §1441-1450, Removal Statute, since it is a general rule under the Federal Anti-injunction Statutes that Federal District Courts are prohibited from granting injunctions to stay proceedings in any state court (28 U.S.C.A. §2283).

VII. Whether the Supreme Court honors request pursuant to Rule 15(a) that leave of Court be obtained for the amendment of pleadings, in such situations "leave shall be freely given when justice so requires" and "this mandate is to be heeded," as in the Supreme Court in *Forman v. Davis* (1962).

VIII. Whether the federal doctrine of equitable tolling applies in a civil rights action under 42 U.S.C.A. §1983 when a borrowed state statute of limitations does not toll the statute during periods of incompetency or disability and not following the state statute will defeat the goals of §1983 and effectively deprive a claimant, who is mentally incompetent or disabled and has no understanding of her cause of action, of any opportunity to seek redress for constitutionally protected civil rights, and the strict adherence to the anti-tolling provision of the borrowed state statute of limitations contradicts all other state/territorial tolling provisions and therefore will violate the uniform application of statutes of limitations in civil rights cases.

QUESTIONS PRESENTED FOR REVIEW – Continued

IX. Whether federal courts apply the borrowed state statute of limitations for personal injury actions in a 42 U.S.C.A. §1983 case, according to the federal common law and by not following the state statute will defeat the goals of §1983 and effectively deprive the claimant, who is disabled, of any opportunity to seek redress for deprivations of her United States Constitutionally protected rights and the strict adherence to the anti-tolling provision of the borrowed state statute of limitation contradicts all other state/territorial tolling provisions and therefore will violate the uniform application of statutes of limitations in civil rights cases.

X. Whether Congress enacted provisions barring retaliation in each of the statutes enforced by the Commission in large part to ensure that employees remain free to report suspected violations to the government.

FURTHER QUESTIONS TO BE PRESENTED LATER FOR REVIEW

I. Whether the litigant's case presents important questions of federal law which have not been, but should be settled by this Court regarding a civil action under §1 of the Sherman Act challenging a continuing conspiracy in restraint of contracts declared to be illegal and the Statutes involved §1 of the Sherman Act (15 U.S.C. 1), Contracts, Combinations, and Conspiracies in Restraint of Trade.

II. Whether the litigant's case also presents important questions of federal law which have not been, but should be settled by this Court regarding a civil action under the Statute of Racketeered Influenced and Corrupt Organizations Act (18 U.S.C. §1962), Prohibited activities (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce; (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt; and (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section.

FURTHER QUESTIONS TO BE PRESENTED LATER FOR REVIEW – Continued

III. Whether the litigant's case presents an important question of federal law which has not been, but should be settled by this Court, the District Court erred in holding that a civil action under Sherman Act challenging a continuing conspiracy in contracts, combinations and conspiracies in restraint of trade in litigant's cause of action which was barred by the res judicata release in connection with the prior anti-discrimination litigation regarding ADA claims as well as ADEA claims of discrimination, while apparently accepting that a res judicata release is void against public policy if it purports to release future anti-discrimination violations, the courts should have attempted to distinguish this case by holding that no "future" violations of the anti-discrimination laws and anti-trust laws were involved in challenging the actions of Attorney Thomas Guelzow and Attorney George Senteney as well as Attorney Victor Arellano and Attorney Thomas Arnot by their prior release as counsel for litigant.

IV. Whether the litigant's case presents an important federal question which has not previously been settled by this Court in holding that litigant contends that a release is not valid if it permits a continuing conspiracy in unreasonable restraint of trade to continue and litigant will prove "a New Post-Release Agreement" in order to establish a CAUSE OF ACTION NOT BARRED BY THE RELEASE since litigant's position will substantiate that the RELEASE WAS VOID AS AGAINST PUBLIC POLICY because it allowed a continuation of conspiracy in unreasonable restraint of trade against DIVERSIFIED MEDICAL CORPORATION in the State of Minnesota which to litigant's belief and knowledge was shut down for illegal purposes.

FURTHER QUESTIONS TO BE PRESENTED LATER FOR REVIEW – Continued

V. Whether the Courts recognize that the same reasoning applies with equal force to continuing conspiracies in unreasonable restraint of trade to absolve the parties to a conspiracy entered into prior to a release from liability for continuing the conspiracy after the release not only impacts the parties to the release but the public as well, since there is simply no difference between a future violation and a continuing violation for these purposes of which the continuation of the pre-release conspiracy or agreement is sufficient to create the adverse impact upon competition.

VI. Whether the Courts recognize that a NEW CAUSE OF ACTION under §1 of the Sherman Act occurs when an act in furtherance of a conspiracy injures a litigant and whether the Courts address this issue to ensure that Sherman Act's purpose of protecting competition is fulfilled and to recognize that fact and thereby protect competition embodied in §1 of the Sherman Act therefore strengthening the legislative policy.

VII. Whether the Courts recognize and address the issue and reaffirm that in an ongoing conspiracy, a NEW CAUSE OF ACTION ACCRUES each time an act causing injury occurs, and the date of the initial formation of the conspiracy is irrelevant.

FURTHER QUESTIONS TO BE PRESENTED LATER FOR REVIEW – Continued

VIII. Whether the Courts recognize that to allow the release of ongoing and future violations of Racketeered Influenced and Corrupt Organizations Act (18 U.S.C. §1962) Prohibited Activities (RICO) would be contrary to public policy and the same reasoning that governs antitrust actions should govern RICO actions as well as anti-discrimination actions.

IX. Whether the Courts recognize and address these important issues so as to preserve the legislative scheme of enforcement embodied in RICO otherwise the release would jeopardize that interest by insulating defendants' continuing RICO violations. RICO protects the public at large, as with the antitrust laws and should extend to anti-discrimination laws at large.

X. Whether the litigant has presented important federal questions relating to the enforcement of the antitrust laws and RICO as well as the Sherman Act in order to prevent conspiracies in violation of those statutes from being continued once a private action has been settled and these questions should be addressed by the Court so as to preserve the ability of private individuals such as litigant to continue enforcing the law in furtherance of clear legislative policy.

LIST OF PARTIES
TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Seventh Circuit.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES xvi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Statement of Facts 2

B. Procedural History 4

REASONS FOR GRANTING THE WRIT 6

I. IS A PARTY TO LITIGATION IN A STATE COURT WHERE THE ISSUE IN DISPUTE IS WHETHER OR NOT SHE HAS DISCHARGED HER ATTORNEY "FOR CAUSE ENTITLED TO A TRIAL BY JURY AS A MATTER OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES? 6

II. THE DECISION OF THE TRIAL COURT AND THE COURT OF APPEALS OF WISCONSIN DENYING THE PETITIONER A JURY TRIAL ON THE FACTUAL ISSUES OF WHETHER THE ATTORNEY HAD "JUST CAUSE" TO DISCHARGE HIMSELF OR HIS CLIENT WAS CLEARLY CONTRARY TO THE CONSTITUTIONS OF BOTH WISCONSIN AND THE UNITED STATES 13

TABLE OF CONTENTS – Continued

Page

III. DID THE TRIAL COURT ABUSE ITS DISCRETION AND DENY PETITIONER HER CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN IT REFUSED TO ALLOW HER TO PRESENT TO THE JURY EXPERT TESTIMONY ABOUT DISABILITIES THAT MAKE HER PARTICULARLY SUSCEPTIBLE TO PRESSURE AND COERCION, AND THUS LIKELY TO INVOLUNTARILY AND FALSELY INCRIMINATE HER REGARDING LACK OF DISABILITIES? 16

IV. THE IDENTITY OF PARTIES LIABLE UNDER SECTION 35.134 RETALIATION AND COERCION, SECTION 35.134 IMPLEMENTS SECTION 503 OF THE AMERICANS WITH DISABILITIES ACT (ADA) AND 29 U.S.C. 623(d) WHICH PROHIBITS RETALIATION AGAINST ANY INDIVIDUAL WHO EXERCISES HIS OR HER RIGHTS UNDER THE ACT IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT..... 17

V. THE SEVENTH CIRCUIT'S DECISION ON THE SCOPE OF LIABILITY UNDER SECTION 35.134 RETALIATION AND COERCION, SECTION 35.134 IMPLEMENTS SECTION 503 OF THE AMERICANS WITH DISABILITIES ACT (ADA), THE REHABILITATION ACT, 29 U.S.C. §794(a) and 29 U.S.C. §623(d) WHICH PROHIBITS RETALIATION AGAINST ANY INDIVIDUAL WHO EXERCISES HIS OR HER RIGHTS UNDER THE ACT IS INCONSISTENT WITH THE INTENT OF CONGRESS, AS IS REFLECTED BY THE PLAIN LANGUAGE, STRUCTURE, AND LEGISLATIVE HISTORY OF THE STATUTE..... 19

TABLE OF CONTENTS – Continued

Page

VI. FEDERAL JURISDICTION FOR REMOVAL OF ERD (EQUAL RIGHTS DIVISION) STATE CLAIMS TO FEDERAL COURT JURISDICTION: CITATION: 28 U.S.C. §1441-1450, REMOVAL STATUTE, SINCE IT IS A GENERAL RULE UNDER THE FEDERAL ANTI-INJUNCTION STATUTES THAT FEDERAL DISTRICT COURTS ARE PROHIBITED FROM GRANTING INJUNCTIONS TO STAY PROCEEDINGS IN ANY STATE COURT (28 U.S.C.A. §2283) 20

VII. THE SUPREME COURT HONORS REQUEST PURSUANT TO RULE 15(A) THAT LEAVE OF COURT BE OBTAINED FOR THE AMENDMENT OF PLEADINGS, IN SUCH SITUATIONS "LEAVE SHALL BE FREELY GIVEN WHEN JUSTICE SO REQUIRES" AND "THIS MANDATE IS TO BE HEEDED," AS IN THE SUPREME COURT IN *FORMAN V. DAVIS* (1962)..... 21

TABLE OF CONTENTS – Continued

Page

VIII. THE FEDERAL DOCTRINE OF EQUITABLE TOLLING APPLIES IN A CIVIL RIGHTS ACTION UNDER 42 U.S.C.A. §1983 WHEN A BORROWED STATE STATUTE OF LIMITATIONS DOES NOT TOLL THE STATUTE DURING PERIODS OF INCOMPETENCY OR DISABILITY AND NOT FOLLOWING THE STATE STATUTE WILL DEFEAT THE GOALS OF §1983 AND EFFECTIVELY DEPRIVE A CLAIMANT, WHO IS MENTALLY INCOMPETENT OR DISABLED AND HAS NOT UNDERSTANDING OF HER CAUSE OF ACTION, OF ANY OPPORTUNITY TO SEEK REDRESS FOR CONSTITUTIONALLY PROTECTED CIVIL RIGHTS, AND THE STRICT ADHERENCE TO THE ANTI-TOLLING PROVISION OF THE BORROWED STATE STATUTE OF LIMITATIONS CONTRADICTS ALL OTHER STATE/TERRITORIAL TOLLING PROVISIONS AND THEREFORE WILL VIOLATE THE UNIFORM APPLICATION OF STATUTES OF LIMITATIONS IN CIVIL RIGHTS CASES 22

TABLE OF CONTENTS – Continued

Page

IX. FEDERAL COURTS APPLY THE BORROWED STATE STATUTE OF LIMITATIONS FOR PERSONAL INJURY ACTIONS IN A 42 U.S.C.A. §1983 CASE, ACCORDING TO THE FEDERAL COMMON LAW AND BY NOT FOLLOWING THE STATE STATUTE WILL DEFEAT THE GOALS OF §1983 AND EFFECTIVELY DEPRIVE THE CLAIMANT, WHO IS DISABLED, OF ANY OPPORTUNITY TO SEEK REDRESS FOR DEPRIVATIONS OF HER UNITED STATES CONSTITUTIONALLY PROTECTED RIGHTS AND THE STRICT ADHERENCE TO THE ANTI-PROTECTED RIGHTS AND THE STRICT ADHERENCE TO THE ANTI-TOLLING PROVISION OF THE BORROWED STATE STATUTE OF LIMITATION CONTRADICTS ALL OTHER STATE/TERRITORIAL TOLLING PROVISIONS AND THEREFORE WILL VIOLATE THE UNIFORM APPLICATION OF STATUTES OF LIMITATIONS IN CIVIL RIGHTS CASES 24

X. CONGRESS ENACTED PROVISIONS BARRING RETALIATION IN EACH OF THE STATUTES ENFORCED BY THE COMMISSION IN LARGE PART TO ENSURE THAT EMPLOYEES REMAIN FREE TO REPORT SUSPECTED VIOLATIONS TO THE GOVERNMENT 28

CONCLUSION 28

APPENDIX A:

August 23, 1999 Unpublished Order of the United States Court of Appeals for the Seventh Circuit ..... App. 1

September 9, 1998 Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin ..... App. 5

TABLE OF CONTENTS – Continued

Page

September 10, 1998 Judgment Order of the United States District Court for the Western District of Wisconsin ..... App. 8

September 18, 1998 Transcript of Judgment of the United States District Court for the Western District of Wisconsin ..... App. 10

August 23, 1999 Judgment Order of the United States Court of Appeals For the Seventh Circuit for denial of oral argument, Judgment – Without Oral Argument ..... App. 12

September 20, 1999 Order of the United States Court of Appeals For the Seventh Circuit for denial of rehearing ..... App. 14

October 20, 1999 Order of the United States Court of Appeals For the Seventh Circuit for denial for Cir.R. 41(D), Stay of Execution of Judgment Enforcing Administrative Order Subject To Same Requirement as Stay of Mandate Pending the Filing of Petition For Certiorari in the Supreme Court, however, Response to Motion To Recall The Mandate is still before the Court ..... App. 15

February 16, 1999 Judgment Order of the United States Court of Appeals For the Seventh Circuit that plaintiff's complaint is dismissed without prejudice to refiling after she has exhausted her administrative remedies ..... App. 16

December 23, 1997 Order of Social Security Administration Office of Hearings and Appeals for determination issuing finding claimant disabled since March 21, 1997 by Administrative Law Judge, Jerome J. Berkowitz ..... App. 17

TABLE OF CONTENTS – Continued

Page

November 22, 1999 letter from United States Department of Education Office of Inspector General to respond to inquiries from the Department of Justice related to ECSD Title I allegations and the Department of Justice's forwarding of claimant's documents to Ms. Norma Cantu, Department's Assistant Secretary for the Office for Civil Rights regarding issues of claimant under the Americans with Disabilities Act..... App. 19

March 19, 1999 Decision on Motion to Dismiss... App. 21

January 12, 1999 Fair Employment Decision..... App. 24

September 28, 1998 Decision and Order..... App. 27

TABLE OF AUTHORITIES

Page

CASES

Beers v. Kuehn, 84 Wis. 33, 54 N.W. 109 (1893) 15

Bernstein v. Universal Pictures, Inc., 79 FRD 59 (D.C.N.Y. 1978) 7

Berry v. U.S., 312 U.S. 450, 61 S.Ct. 637, 85 L.Ed. 945 (1941) 12

Board of Regents v. Tomanio, 446 U.S. 478, 64 L.Ed.2d 440, 100 S.Ct. 1790 (1980) 23

Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d (1997) 6

Carter Equipment Co. v. John Deere Indus. Equipment Co., 681 F.2d 386 (5th Cir. 1982) 15

Chapman v. California, 386 U.S. 78 (1967) 16

Crane v. Kentucky, 476 U.S. 683 (1986) 16

Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974) 8, 13, 18

Dawson Chemical Co. v. Rohn & Haas Co., 448 U.S. 176 (1980) 18

Dilger v. Estate of McQuade, 158 Wis. 328, 148 N.W. 1085 (1914) 15

EEOC v. Cosmair, Inc., 821 F.2d 1085 (44 FEP Cases 569) (5th Cir. 1987) 28

EEOC v. Shell Oil Co., 466 U.S. 68 28

Ehrman v. Cook Elec. Co., 630 F.2d 539 (7th Cir. 1980) 15

Entzminger v. Ford Motor Co., 47 Wis.2d 751, 177 N.W.2d 899 (1970) 15

TABLE OF AUTHORITIES – Continued

Page

Eubanks v. Clarke, 434 F.Supp. 1022 (E.D. Pa. 1977) 25

Galloway v. U.S., 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943) 12

Ganson v. Madigan, 15 Wis. 144, 82 Am. Dec. 659 (1862) 15

General Telephone Co. v. EEOC, 446 U.S. 326 .....27, 28

Hardin v. Straub, 490 U.S. 536, 109 S.Ct. 1998 (1989) 23, 26

Heck v. Humphrey, 997 F.2d 355 (7th Cir. 1993), *cert. granted*, U.S., 114 S.Ct. 2364 (1994) 26, 27

Hefron v. Int'l Society for Krishna Consciousness, 452 U.S. 640 (1981) 18

Herke v. Stauber, 106 Wis.2d 545, 317 N.W.2d 834 (1982) 15

Jansen v. Vils, 34 Wis.2d 332, 149 N.W.2d 551 (1967) 15

Kobs v. Arrow Service Bureau, Inc., 134 F.3d 893 (7th Cir. 1998) 7

Laskaris v. Thornburgh, 733 F.2d 260 (3rd Cir. 1984) 9

Lecates v. Justice of Peace Court 4 of State of Del., 637 F.2d 898 (3rd Cir. 1980) 7

Lorillard v. Pons, 434 U.S. 574, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978) 13

Mesa Petroleum Co. v. Coniglio, 629 F.2d 1022 (5th Cir. 1980) 9

Norval v. Rice, 2 Wis. 17 (1853) 15

Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977) 23

TABLE OF AUTHORITIES – Continued

Page

Parsons v. Bedford, 3 Pet. 433, 7 L.Ed. 732 (1830).....10, 11

Powers v. Allstate Ins. Co., 10 Wis.2d 78, 102 N.W.2d 393 (1960).....13, 14, 15

Reiman Associates, Inc. v. R/A Advertising, Inc., 102 Wis.2d 305, 306 N.W.2d 292 (Ct. App. 1981) 15

Rhea v. Massey-Ferguson, Inc., 767 F.2d 266 (6th Cir. 1985)..... 9

Robinson v. Shell Oil Company, 117 S.Ct. 843 (72 FEP Cases 1856) (1997) 27

Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972)..... 8

Sibley v. Fulton DeKalb Collection Service, 677 F.2d 830 (11th Cir. 1982).....7, 8

State v. Hansford, 219 Wis.2d 226, 580 N.W.2d 171 (1998)..... 15

Steele v. Brewery & Soft Drink Workers Local 1162, 432 F.Supp. 369 (N.D. Ind. 1977) 9

Toth v. Quarles, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955)..... 12

United Auto Workers v. Hoosier-Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107 (1966)..... 25

U.S. v. Wonson, Fed.Cas.No. 16,750, 1 Gall. 5 (1812) 10

United States of America v. One 1976 Mercedes Benz 280S, 618 F.2d 453 (7th Cir. 1980) 10

Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1468, 64 L.Ed.2d 15 (1980).....24, 25, 26

Wood v. International Brotherhood of Teamsters of Chauffeurs, Warehousemen & Helpers of America, Local 406, 565 F.Supp. 1011 (W.D. Mich. 1983)..... 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Americans with Disabilities Act, 42 U.S.C. §12101....2, 3

Fourteenth Amendment of the United States Constitution 16

Federal Rules of Civil Procedures, Rules 56.04(1), 56.15(1), 56.17(18), 56.18, 56.19, 56.20..... 30

Rehabilitation Act, 29 U.S.C.A. §794.....17, 18

28 U.S.C. §1291..... 1

28 U.S.C. §1331.....2, 22

28 U.S.C. §1367..... 22

29 U.S.C. §211..... 28

29 U.S.C. §621 et seq.....2, 3

29 U.S.C. §626(a) 28

29 U.S.C. §706(8)(B) 18

29 U.S.C.A. §§791, 793, 794 ..... 2, 17, 18, 29

29 U.S.C.A. §623(a)(1)..... 2

29 U.S.C.A. §623(d) 2, 19

42 U.S.C. §12101 et seq.....2, 3

42 U.S.C. §2000e-3..... 27

42 U.S.C. §2000e-5(b) 28

42 U.S.C.A. §12102(2)..... 2

42 U.S.C.A. §12111(8)..... 2

42 U.S.C.A. §12111(9)..... 2

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C.A. §12111(10)(A) 2

42 U.S.C.A. §12112(a) 2, 19

42 U.S.C.A. §12112(b)(5) 2

42 U.S.C.A. §12117(a) 28

42 U.S.C.A. §12203(a) 2, 17, 19

42 U.S.C.A. §1983 ..... *passim*

OPINIONS BELOW

The August 23, 1999 Judgment Order of the Seventh Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is at No. 98-3437, is unpublished and is reprinted in Appendix A to this Petition ("Appendix A") at App. 1. The Order of September 20, 1999 of the Seventh Circuit Court of Appeals for denial of rehearing reprinted in Appendix A at App. 14. The Judgment Order – Without Oral Argument of August 23, 1999 of the Seventh Circuit Court of Appeals is reprinted in Appendix A at App. 12. The Order of October 20, 1999 of the Seventh Circuit Court of Appeals for denial of motion for Circuit Rule 41 Issuance and Stay of Mandate Circuit Rule 41(D), Stay of Mandate Pending the Filing of a Petition For Certiorari in the Supreme Court and Response to Motion to Recall the Mandate is reprinted in Appendix at App. 15. The February 16, 1999 Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin at No. 98-C-877-S is reprinted in Appendix A at App. 16. The March 20, 1998 Order is from the Jerome J. Berkowitz, Administrative Law Judge for the Social Security Administration, Office of Hearings and Appeals. The November 22, 1999 letter of United States Department of Education, Assistant Inspector General for Audit is reprinted at App. 19. The December 5, 1996 Decision and Order is from the Honorable John L. Brown, Administrative Law Judge for the State of Wisconsin, Department of Workforce Development, Equal Rights Division at ERD Case No. 199504328 and EEOC Case No. 260960026, with attached Certification of the Hearing Section, Equal Rights Division.

JURISDICTION

The Judgment Order of the Seventh Circuit Court of Appeals was entered on August 23, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291. The

United States District Court for the Western District of Wisconsin had subject matter jurisdiction under 28 U.S.C. §1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action was filed pursuant to 42 U.S.C.A. §1983 on the basis that in addition to deterrence, the second federal policy underlying §1983 Civil Rights actions is compensation for the victim who has suffered a violation of his/her Civil Rights. Federal courts, according to federal common law, apply the borrowed state statute of limitations for personal injury actions in a §1983 case. Wisconsin had explicit statutory provisions which toll the statute of limitations during periods of incompetency or disability.

This action was also filed pursuant to the Fourteenth Amendment of the United States Constitution and the Rehabilitation Act, 29 U.S.C.A. §794.

This action was further filed pursuant to the Americans With Disabilities Act ("ADA"), 42 U.S.C. §12101 et seq., and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 et seq. 29 U.S.C.A. §623(a)(1), 29 U.S.C.A. §623(d), 42 U.S.C.A. §12102(2), 42 U.S.C.A. §12111(8), 42 U.S.C.A. §12111(9) 42 U.S.C.A. §12111(10)(A), 42 U.S.C.A. §12112(a), 42 U.S.C.A. §12112(b)(5), and 42 U.S.C.A. §12203(a).

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner alleges that she was the victim of a continuing pattern and practice of discrimination perpetuated against her by her employer, Eau Claire Public Schools, and her WEAC Labor Union, as represented by Thomas Blount, Union President and Michael Burke, NUE Attorney for WEAC Labor Union. Petitioner claims that defendants have discriminated

against her on the basis of her disability and age with respect to the terms, conditions, and privileges of her employment and labor organization membership as prohibited by the Americans with Disabilities Act ("ADA") 42 U.S.C. §12101 et seq. and the Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. §621 et seq., as well as disciplining or treating her more harshly and retaliating against her due to her handicap for filing a complaint against Eau Claire Public Schools previously for being treated less favorably than others because of her protected class in reference to discrimination in layoff/firing, job assignments, leave or benefits and training.

Petitioner strongly believes that she was retaliated against for asserting her rights under fair employment law for open records of Title I expenditures and making complaint to the U.S. Department of Education Inspector General, Washington, D.C.

Petitioner alleges that her employer Eau Claire Public Schools interfered with her rights as their employee to file a charge or to participate in EEOC hearings, ERD hearings, investigations, or other proceedings under the ADA, Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, or the Equal Pay Act. These are non-waivable rights built upon the premise that (a) interference with these protected rights is contrary to public policy; and (b) the anti-retaliation provisions of the civil rights statutes prohibit such conduct. This enforcement guidance set forth the EEOC's position that an employer may not interfere with the protected right of the employees to file a charge or participate in any manner in an investigation, hearing, or proceeding under the laws enforced by EEOC.

B. Procedural History

Petitioner filed a complaint pro se in the Western District of Wisconsin on August 8, 1995, pursuant to the American with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA). Petitioner alleges that Respondents of Eau Claire Public Schools and WEAC Labor Union violated her civil rights by discriminating against her in terms and conditions of her employment on the basis of her medical disability and age.

On December 14, 1995 Respondent moved to dismiss Petitioner's claims. On January 1, 1996 U.S. Western District Court denied Respondent's motion to dismiss Petitioner's claims under ADA and ADEA in court order dated January 22, 1996. On February 8, 1996 Respondent filed motion for summary judgment. On February 12, 1996, Petitioner contacted Attorney Arellano who agreed to represent her in this action.

Attorney Arellano concluded upon review of all documents that Petitioner had not engaged in any formal discovery in this matter and that litigation would require substantial time and preparation. Attorney Arellano submitted that an extension of time must be granted in order to allow Petitioner an opportunity to combat Respondent's Motion for Summary Judgment and that a continuance be granted to allow Petitioner time to prepare for trial with assistance of counsel. Since Attorney Arellano's withdrawal from counsel, review of all the documents indicates that formal discovery was not taken by Attorney Arellano of any Respondents other than WEAC Union's President Thomas Blount and NUE WEAC Attorney Michael Burke.

Petitioner needed to engage in substantial discovery including the exchange of interrogatories, the request for production of documents including medical records, and the taking of depositions in order to oppose Respondent's motion. Attorney Arellano never did any depositions for ERD State Hearing nor were depositions taken of any medical doctors,

only WEAC Union President Thomas Blount and NUE Attorney Michael Burke, which was requested by WEAC Labor Union Attorney John Finerty.

Respondent Eau Claire Public Schools as well as Respondents Blount and Burke moved for summary judgment prior to Petitioner's being able to offer certain specific facts showing discrimination without information and testimony regarding Petitioner's Automobile Accident of September 25, 1986.

Respondent Eau Claire Public Schools and Respondents Blount and Burke as represented by WEAC Labor Union moved for Summary Judgment prior to providing these records which would have substantiated employment discrimination claims as well as ADA and ADEA claims.

Petitioner has proven that she is disabled within the meaning of the ADA as substantiated by case before the Administrative Law Judge on January 21, 1998 issuing a fully favorable determination finding Petitioner disabled since March 21, 1997. This determination dated January 21, 1998 stands as a final decision of the Secretary.

Petitioner has proven that she is disabled within the meaning of the ADA and that she has met her threshold burden by establishing that she has an impairment which significantly limits any of her major life activities. Specifically, under the rule of Roth, Petitioner has proved that she has a physical and/or mental disability which substantially limits one or more of her major life activities; a record of such an impairment; and that others regard her as having such an impairment. "Major life activities" are defined as "functions, such as care for oneself, performing manual tasks, walking, seeing, speaking, breathing, learning, and working." The term "substantially limits" means that the individual is either unable to perform, or significantly restricted as to the condition, manner or duration under which the individual can perform, a major life activity as compared to an average person in the general population.

In addition, in every respect to incidents where Petitioner was involved, the Respondent refused to adequately accommodate Petitioner's disability, but accommodated other teachers in similar positions. Respondent refused to assign Petitioner to positions which she was qualified for and which would have accommodated her disabilities and, then, instead assigned these positions to less qualified, less senior and younger (less than 40 years old) teachers.

The Petitioner's argument is previously submitted Petitioner's Brief has proved that (1) Petitioner is disabled within the meaning of the ADA, and (2) Respondent discriminated against her unlawfully on the basis of her disability and age, and therefore, is liable for all of the damages she is entitled to under the law, together with court costs and attorney's fees.

REASONS FOR GRANTING THE WRIT

I. IS A PARTY TO LITIGATION IN A STATE COURT WHERE THE ISSUE IN DISPUTE IS WHETHER OR NOT SHE HAS DISCHARGED HER ATTORNEY "FOR CAUSE" ENTITLED TO A TRIAL BY JURY AS A MATTER OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

THE WRIT SHOULD BE GRANTED BECAUSE THIS CASE AFFORDS THE UNITED STATES SUPREME COURT AN OPPORTUNITY TO DECIDE WHETHER DENIAL OF A JURY TRIAL IN A STATE COURT ON THE FACTUAL ISSUE OF WHETHER OR NOT AN ATTORNEY HAS BREACHED HIS RETAINER CONTRACT WITH A CLIENT IS A VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

According to *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d (1997), the constitutional floor established

by the due process clause of the Fourteenth Amendment to the United States requires a fair trial in a fair tribunal.

Petitioner Sandra Lea Benedict has been denied a jury trial when entitled to it, so obviously she has been denied a fair trial in a fair tribunal.

According to *Lecates v. Justice of Peace Court 4 of State of Del.*, 637 F.2d 898 (3rd Cir. 1980), one Court of Appeals called the right of trial by jury a "fundamental liberty."

In *Bernstein v. Universal Pictures, Inc.*, 79 FRD 59 stated the following in the District Court in New York in 1978:

> "The right to a jury trial, where it exists, is so central to our system of Jurisprudence that abrogation of that right must be regarded as an extreme measure of last resort." 79 FRD at 70.

According to *Kobs v. Arrow Service Bureau, Inc.*, 134 F.3d 893 at 896-898, January 22, 1998 the United States Court of Appeals for the Seventh Circuit declared:

> "In *Sibley v. Fulton DeKalb Collection Service*, 677 F.2d 830 (11th Cir. 1982) the court held that a party upon timely demand is entitled to a jury trial in an action for damages under the *FDCS*. *Id.* at 832. The court noted that there are two possible sources of a right of trial by jury for a statutory cause of action. *Id.* Congress may provide for trial by Jury in the statute that creates the claim regardless of whether the claim involves rights and remedies of the type traditionally enforced in a court of law before a jury. *Id.* Alternatively, if the claim involves rights and remedies of the type traditionally enforced in an action at law, the Seventh Amendment requires that the right of jury trial be preserved. *Id.*"
>
> "The question then is whether the Seventh Amendment (fn. 1) to the Constitution mandates a jury trial. This analysis involves a determination of whether the rights under the statute are rights that would have been resolved historically at law by a jury or in equity by a judge and whether the relief requested by the plaintiff is traditionally granted by

a jury at law or by a judge in equity." *Sibley,* 677 F.2d at 833; see *Curtis v. Loether,* 415 U.S. 189, 195-96, 94 S.Ct. 1005, 1009, 39 L.Ed.2d 260. The rights under the *Fulton DeKalb Collection Service (FDCS)* most resembled tort actions for collection abuses which traditionally have been viewed as being resolved at law and because the relief sought is monetary damages which is the traditional form of relief offered in the courts of law, the 1692k(a)(2) reference to an allowance of damages by the court must be construed to anybody the right of trial by jury, according to the *Sibley* court findings. *Sibley,* 677 F.2d at 834.

In the Supreme Court's decision, *Curtis v. Loether,* 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260, which affirmed the Seventh Circuit's decision in *Rogers v. Loether,* 467 F.2d 1110 (7th Cir. 1972), the Fourth Circuit reached its decision by relying on Curtis stating that the plaintiff filed a private enforcement action under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601, et seq., alleging racial discrimination in housing for which she requested both compensatory and punitive damages. 415 U.S. at 190, 94 S.Ct. at 1006. Defendant's demand for a jury trial was denied, and the court awarded the plaintiff no actual damages and $250 in punitive damages. *Id.* at 191, 94 S.Ct. at 1006-1007. The Seventh Circuit reversed the district court on the jury trial issue and the Supreme Court affirmed in a unanimous decision. *Id.* The issue was whether a jury trial was required under 42 U.S.C. §3612(e) which provides that the court may award to the plaintiff actual damages and not more than $1,000 punitive damages. Finding a constitutional right to a jury trial, the Supreme Court reasoned that a damage action under Title VIII is an action to enforce

> legal rights, sounding basically in tort, and, more important, that the relief sought, actual and punitive damages, is the traditional form of relief offered in the courts of law. *Id.* at 195-96, 94 S.Ct. at 1009."

According to *Mesa Petroleum Co. v. Coniglio,* 629 F.2d 1022 (5th Cir. 1980) as well as in *Rhea v. Massey-Ferguson, Inc.,* 767 F.2d 266 (6th Cir. 1985), a jury trial should be granted in the absence of strong and compelling reasons to the contrary.

In *Laskaris v. Thornburgh,* 733 F.2d 260 (3rd Cir. 1984), a plaintiff is entitled to a jury trial as long as the pleadings appear to state that there is an issue triable of right by a jury. Also, in *Steele v. Brewery & Soft Drink Workers Local* 1162, 432 F.Supp. 369 (N.D. Ind. 1977), states that every reasonable presumption should be indulged in favor of the right to a jury trial and further stating that:

> ". . . . the origin of the duty sought to be enforced, whether in statute, contract, or the common law, does not control the seventh amendment's application. The test is not. . . . whether the specific claim was itself 'known' to the common law. Rather, it must be asked whether closely analogous rights and remedies were recognized by the common law. . . . " 432 F.Supp. at 372.

According to *Wood v. International Brotherhood of Teamsters Chauffeurs, Warehousemen & Helpers of America,* Local 406, 565 F.Supp. 1011 stated:

> "The right to trial by Jury in civil cases is a basic and fundamental feature of the system of federal jurisprudence. The Supreme Court has held that courts should zealously guard against any diminution of this right. See *Jacob v. City of New York,* 315 U.S. 752, 452-53, 62 S.Ct. 854, 854-55, 86 L.Ed. 1166 (1942). Accordingly, in *Dimick v. Schiedt,* 293 U.S. 474, 485, 55 S.Ct. 296, 300, 79 L.Ed. 603 (1935), the Supreme Court held that courts should zealously guard against any diminution of this right. In *Simler v. Conner,* 372 U.S.

> 221-222, 83 S.Ct. 609, 610, 9 L.Ed.2d 691 (1963), the Supreme Court stated more recently that 'the federal policy favoring Jury trials is of historic and continuing strength.'

The Seventh Amendment created no new right to jury trial; however, it preserved the right to jury trial in cases that had previously enjoyed the right under pre-existing law.

In *United States of America v. One 1976 Mercedes Benz 280S*, 618 F.2d 453 (7th Cir. 1980), the following citation states Judge Dumbauld's opinion:

> "The Seventh Amendment upon which any constitutional right to jury trial in civil cases depends, provides: In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

According to *U.S. v. Wonson*, Fed.Cas.No. 16,750, 1 Gall. 5 (1812), Justice Joseph Story, District of Massachusetts, stated: "Beyond all question, the common law here alluded to is not the common law of any individual state (for it probably differs in all), but it is the common law of England, the grand reservoir of all our Jurisprudence." (28 Fed.Cas. at 750, 1 Gall. 5). In *Parsons v. Bedford*, 3 Pet. 433, 446-47, 7 L.Ed. 732 (1830) the same jurist stated: "The trial by jury is justly dear to the American people. . . . The phrase 'common law', found in this clause, is used in contradistinction to equity, and admiralty and maritime Jurisprudence.' Suits 'at common law' were 'suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit. . . . In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights'. . . . "

> " . . . Our inquiry in the case at bar therefore is a historical investigation, whether under English and American Practice, proximately prior to December 15, 1971, trial by jury was utilized in civil proceedings in rem for enforcement of statutory forfeitures in violation of customs laws or other statutes; or whether, on the other hand, such a proceeding fell within the scope of equity or admiralty, where jury trial was traditionally unavailable . . . " 618 F.2d 453 at 456-457, 458.

Judge Dumbauld stated that a jury trial was compelled in the case at bar with respect to the right to trial by jury in cases involving In Rem seizures and admiralty law concluding:

> "Regrettable our conclusion may add to the caseload of the federal court system and require additional time in trying forfeiture cases. But ordinarily forfeiture proceedings are instituted in connection with criminal prosecutions arising out of the same transactions, and under modern procedures it should be practicable for the same jury to dispose of the civil and criminal proceedings concurrently and upon the same evidence. The fact that one facet of the case is in rem and the other in personam, that the burden of proof rests on different parties and is to be determined under a different standard, should cause no confusion if clear and adequate instructions are given by the trial court. But in any event, mere inconvenience would be insufficient reason for denying a traditional and substantial constitutional right." *Curtis v. Loether,* 415 U.S. 189, 198, 94 S.Ct. 1005, 1010, 39 L.Ed.2d 260 (1974); *Pernell v. Southall Realty,* 416 U.S. 363, 383-85, 94 S.Ct. 1723, 1733-1734, 40 L.Ed.2d 198 (1974); *Goldberg v. Kelly,* 397 U.S. 254, 265-66, 90 S.Ct. 1011, 1019, 25 L.Ed.2d 287 (1970).

Justice Story, an advocate for extensive admiralty Jurisdiction, stated in *Parsons v. Bedford* the following: " 'The trial by Jury is justly dear to the American people. It has

always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy . . . One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the Seventh Amendment. . . . which received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people.' Jury trial 'ranks high in our catalogue of constitutional safeguards,' according to the late Justice Hugo Black which regarded the jury as constitutional tribunal provided for trying facts by juries . . . was and declared that 'The founders of our government thought that trial of fact by juries . . . was an essential bulwark of civil liberty.' " *Toth v. Quarles,* 350 U.S. 11, 16, 76 S.Ct. 1, 5, 100 L.Ed. 8 (1955); *Berry v. U.S.,* 312 U.S. 450, 453, 61 S.Ct. 637, 638, 85 L.Ed. 945 (1941); *Galloway v. U.S.,* 319 U.S. 372, 397, 63 S.Ct. 1077, 1090, 87 L.Ed. 1458 (1943).

Furthermore, in the particular type of proceeding here involved, the infusion of the earthly common sense of a jury might upon occasion mitigate appropriately the harsh impact sometimes characteristic of in rem procedure, as discussed at the onset of this opinion. Both history and policy thus constrain us to conclude that this case must be remanded for jury trial.

Remanded for further proceedings in accordance with this opinion. 618 F.2d 453, at 468-469.

II. THE DECISION OF THE TRIAL COURT AND THE COURT OF APPEALS OF WISCONSIN DENYING THE PETITIONER A JURY TRIAL ON THE FACTUAL ISSUES OF WHETHER THE ATTORNEY HAD "JUST CAUSE TO DISCHARGE HIMSELF OR HIS CLIENT" WAS CLEARLY CONTRARY TO THE CONSTITUTIONS OF BOTH WISCONSIN AND THE UNITED STATES.

According to *Lorillard v. Pons,* 434 U.S. 574, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978), a right to a jury trial is required under the Constitution since it is self-evident that in all cases "legal" relief is available and "legal rights" are determined. In quoting from *Curtis v. Loether,* 415 U.S. 189, 194, 94 S.Ct. 1005, 1005-1008, 39 L.Ed.2d 260 (1974), the right to a jury trial is determined by whether the statutes under which the suit is brought creates "legal rights, remedies enforceable in an action for damages in the ordinary courts of law."

The United States Court of Appeals For the Seventh Circuit decided that the petitioner was not entitled to a jury trial under the Wisconsin Constitution, Article 1 §5. The Court of Appeals' Opinion is an Unpublished Order and the Supreme Court of the United States denied the Petition for Review in Petitioner's Petition For Writ Of Certiorari, Case No. 97-1945, dated October Term, 1997. See Appendix A. The unpublished order has denied the petitioner meaningful access to the courts and has compounded the constitutional violation.

In citing *Powers v. Allstate Ins. Co.,* 10 Wis.2d 78, 89, 102 N.W.2d 393, 399 (1960), the Powers decision is not precedent for denying the petitioner a jury trial but forty (40) years ago was handed down by the Wisconsin Supreme Court and did not concern itself with whether or not an attorney was discharged from his employment by his client "for just cause" and did not concern itself with whether or not a party is entitled to a jury trial on the factual issues.

Powers instead involved recovery for personal injury damages in an action brought by a woman who was a passenger in an automobile collision. Two drivers and their insurance carriers were defendants in the case which was tried to the court and a jury. The plaintiff sustained permanent injuries and the two drivers were causally negligent. Damages for pain and suffering and permanent injury were awarded to the plaintiff. The trial court changed the jury verdict on motions after verdict. Questions set forth on appeal to the Wisconsin Supreme Court in the opinion follows:

> "(1) Is there credible medical evidence to sustain the jury's finding of permanent disability?
>
> (2) If such question be answered in the affirmative, are the damages awarded for such permanent disability excessive?
>
> (3) If such damages are excessive, what is the proper option to extend to the plaintiff as an alternative to granting a new trial as to damages?"
>
> 10 Wis.2d 78 at 81.

In *Powers,* the Supreme Court concluded that a trial court was empowered to set aside an excessive Jury award but established a rule that a reduced amount or a second trial can be opted for in those circumstances. However, this opinion does NOT HOLD THAT A PARTY TO A BREACH OF CONTRACT ACTION IS NOT ENTITLED TO A TRIAL BY JURY. The *Powers* court, to the contrary, recognized that under the Wisconsin Constitution Jury trials are "mandatory" in "all cases at law without regard to the amount in controversy." (10 Wis.2d 88-89) and further stated the following:

> "The right to trial by jury preserved by this provision of the constitution is the right as it existed at the time of the adoption of the constitution in 1848. *Campbell v. Sutliff* (1927), 193 Wis. 370, 214 N.W. 374, 53 A.L.R. 771. The power of courts to set aside excessive verdicts and to grant new trials was firmly established even before the adoption of the United States constitution. *Ibid.* In the early case of

> *Corcoran v. Harran* (1882), 55 Wis. 120, 127, 12 N.W. 468, the court declared:
>
> 'We must therefore hold that, in actions of tort as well as contract where the damages are clearly excessive, the trial judge may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, and in case he does so order the verdict to stand for the residue . . . ' "

Contract disputes of fact are expressly recognized in *Powers* and are to be resolved by the trial by jury when it cites the *Corcoran* opinion.

In *Dilger v. Estate of McQuade,* 158 Wis. 328, 148 N.W. 1085 (1914), throughout history of Anglo American and Wisconsin jurisprudence, damages for breach of contract in an action has been triable by a jury as a matter of right. See also, *Jansen v. Vils,* 34 Wis.2d 332, 149 N.W.2d 551 (1967); *Reiman Associates, Inc.,* 102 Wis.2d 305, 306 N.W.2d 292 (Ct. App. 1981); *Herke v. Stauber,* 106 Wis.2d 545, 317 N.W.2d 834 (1982); *Entzminger v. Ford Motor Co.,* 47 Wis.2d 751, 177 N.W.2d 899 (1970); *Ganson v. Madigan,* 15 Wis. 144, 82 Am. Dec. 659 (1862); *Beers v. Kuehn,* 84 Wis. 33, 54 N.W. 109 (1893); *Ehrman v. Cook Elec. Co.,* 630 F.2d 529 (7th Cir. 1980) and *Carter Equipment Co. v. John Deer Indus. Equipment Co.,* 681 F.2d 386 (5th Cir. 1982).

The Wisconsin Supreme Court in 1883 acknowledged the following:

> "It is evident that §5 (Article 1) Wisconsin Constitution referred to, was intended to secure the right to trial by Jury in civil and not criminal actions. The words in the section 'and shall extend to all cases at law, without regard to the amount in controversy,' clearly limit the provisions of that section to civil actions at law, and exclude the idea that it was intended to apply to criminal actions."
>
> *Bennett v. State,* 57 Wis. 69, 14 N.W. 912 (1883).

Justice Crooks, in *State v. Hansford,* 219 Wis.2d 226, 580 N.W. 2d 171 (1998) quoted from *Norval v. Rice,* 2 Wis. 17 (1853) as follows:

> "What greater security can any person have in his life, liberty or estate, than to be sure of not being divested of, or injured in any of these, without the sense of verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta. Bacon's Ab., Title 'Juries' vol. 5, p. 308. . . . " 219 Wis.2d at 237.

III. DID THE TRIAL COURT ABUSE ITS DISCRETION AND DENY PETITIONER HER CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN IT REFUSED TO ALLOW HER TO PRESENT TO THE JURY EXPERT TESTIMONY ABOUT DISABILITIES THAT MAKE HER PARTICULARLY SUSCEPTIBLE TO PRESSURE AND COERCION, AND THUS LIKELY TO INVOLUNTARILY AND FALSELY INCRIMINATE HER REGARDING LACK OF DISABILITIES?

> According to Amendment XIV, No State. . . . shall deprive any person of life, liberty, or property, without due process of law. . . .

A defendant is entitled under the Sixth and Fourteenth Amendments to the Federal Constitution to present a meaningful defense. *Crane v. Kentucky, id.* In *Chapman v. California,* 386 U.S. 18, 23 (1967), denial of a Constitutional right requires reversal unless it was harmless error beyond a reasonable doubt.

Petitioner, Sandra Lea Benedict through expert medical testimony could have established the "physical and psychological environment that yielded the disabilities," see *Crane v. Kentucky, id.,* at 689, which Petitioner Benedict had a Constitutional right to do. *Id.* The State can not refute that this testimony is Constitutionally required to be admitted, as it is crucial evidence on the question of the reliability of Benedict's disabilities, especially since reliability is ultimately a jury question.

IV. THE IDENTITY OF PARTIES LIABLE UNDER SECTION 35.134 RETALIATION AND COERCION, SECTION 35.134 IMPLEMENTS SECTION 503 OF THE AMERICANS WITH DISABILITIES ACT (ADA) AND 29 U.S.C. 623(d) WHICH PROHIBITS RETALIATION AGAINST ANY INDIVIDUAL WHO EXERCISES HIS OR HER RIGHTS UNDER THE ACT IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Since the Americans With Disabilities Act is a federal civil rights statute of far-reaching national importance and great public interest, this case presents to the court an important and recurring question of federal statutory interpretation. The major purposes of the ADA is providing "CLEAR, STRONG, CONSISTENT, ENFORCEABLE STANDARDS addressing discrimination against individuals with disabilities." 42 U.S.C. §12203(a) (emphasis added).

42 U.S.C. §12203(a), Paragraph (a) of 35.134 provides:

> Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

This case is presently being brought forward in State Circuit Court, Eau Claire, Wisconsin in Case No. 99CV441, *Sandra Lea Benedict v. Labor Industry and Review Commission,* et al., for Judicial Review by the Department of Justice (DOJ) alleging that Eau Claire Public School District, WEAC Labor Union and Eau Claire Association of Educators and their representing attorneys' are liable for violations of 42 U.S.C. §12203(a) and The Rehabilitation Act, 29 U.S.C. §794(a).

Certiorari review by this Court will resolve the confusion that currently exists in the lower courts and avoid further conflict concerning the scope of liability under Section

35.134 Retaliation or Coercion implementing Section 503 of the ADA as well as The Rehabilitation Act, 29 U.S.C. §794(a) which provides promulgation of nondiscriminatory rules and regulations; copies to appropriate committees. No otherwise qualified individual with a disability in the United States, as defined in section 7(8) 29 USCS §706(8), shall, solely by reason of her or his disability, be excluded form participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. See *Dawson Chemical Co. v. Rohn & Haas Co.*, 448 U.S. 176, 185 (1980) (certiorari granted "to forestall possible conflict in the lower courts"). The same issues of statutory liability, involving these same parties, is already pending before the Seventh Circuit Court of Appeals Case No. 98-3437, District Court Case No. 98-C-3213-S as well as Seventh Circuit Court of Appeals Case No. 99-2001 and 99-2216, District Case No. 99-C-7-S and the present case in Eau Claire County State Court Case No. 99CV441, Eau Claire County State Court Case No. 98 TJ 34A and Eau Claire County State Court Case No. 99 TJ 16A and is very likely to be appealed to the State Court of Appeals, State Supreme Court as well as to the United States Court of Appeals.

Certiorari review may also resolve conflicting decisions of a federal circuit court and evenly divided federal district courts on the issue of the availability of a jury trial under the Civil Rights Act of 1968. See, e.g., *Curtis v. Loether,* 415 U.S. 189, 191 n.2d (1974).

Certiorari review may also resolve conflict between federal circuit court and federal district court concerning constitutionality of state regulation. See *Hefron v. Int'l Society for Krishna Consciousness,* 452 U.S. 640, 646 n.9 (1981).

In light of the importance of the issues presented, the likelihood that the issue will arise in the future, and the many conflicting decisions of the lower courts, the need for guidance from this Court is substantial.

V. THE SEVENTH CIRCUIT'S DECISION ON THE SCOPE OF LIABILITY UNDER SECTION 35.134 RETALIATION AND COERCION, SECTION 35.134 IMPLEMENTS SECTION 503 OF THE AMERICANS WITH DISABILITIES ACT (ADA). THE REHABILITATION ACT, 29 U.S.C. §794(a) AND 29 U.S.C. §623(d) WHICH PROHIBITS RETALIATION AGAINST ANY INDIVIDUAL WHO EXERCISES HIS OR HER RIGHTS UNDER THE ACT IS INCONSISTENT WITH THE INTENT OF CONGRESS, AS IS REFLECTED BY THE PLAIN LANGUAGE, STRUCTURE, AND LEGISLATIVE HISTORY OF THE STATUTE.

The Plain Statutory Language and Structure of Section 35.134 which implements Section 503 of the Americans With Disabilities Act (ADA), by incorporating the parties liable under 42 U.S.C. §12112(a) which sets out the "general rule" prohibiting discrimination against Sandra Lea Benedict on the basis of age and disability and taking retaliatory action against her in violation of Title VII of the Civil Rights Act of 1964, as well as 42 U.S.C. §12203(a) which sets out the "general rule" prohibiting retaliation against Sandra Lea Benedict for opposing any act or practice made unlawful by this Act.

42 U.S.C. §12112(a) provides:

> General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. §12203(a) provides:

> Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this act or because such individual made a charge, testified,

assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

Petitioner Sandra Lea Benedict holds that Eau Claire Public School District, WEAC Labor Union and Eau Claire Association of Educators had "actual knowledge" through medical documentation of ADA and ADEA violations of constitutional and statutory provisions and are liable for these violations. Petitioner seeks review of the Seventh Circuit's unpublished order or decision concerning the identities of parties who may be held liable under the following Constitutional and Statutory Provisions regarding ADA and ADEA claims of discrimination and retaliation.

VI. FEDERAL JURISDICTION FOR REMOVAL OF ERD (EQUAL RIGHTS DIVISION) STATE CLAIMS TO FEDERAL COURT JURISDICTION: CITATION: 28 U.S.C. §1441-1450, REMOVAL STATUTE, SINCE IT IS A GENERAL RULE UNDER THE FEDERAL ANTI-INJUNCTION STATUTES THAT FEDERAL DISTRICT COURTS ARE PROHIBITED FROM GRANTING INJUNCTIONS TO STAY PROCEEDINGS IN ANY STATE COURT (28 U.S.C.A. §2283).

Petitioner's Attorney Victor Arellano motioned ERD (Equal Rights Division) to Stay the Proceedings and place the ERD hearing in abeyance dated October 23, 1996. Administrative Law Judge John Brown rendered a Decision and Order dismissing, with prejudice, ERD Case No. 199504328 and EEOC Case No. 260960026 in the action of *Sandra Lea Benedict v. Eau Claire Public Schools* on grounds of res judicata.

Petitioner's claims are not barred by the federal doctrine of res judicata, since the decision reached by a federal court in a Title VII suit is not res judicata in a complaint filed under the Act in which the statutes express an intent to accord parallel or overlapping remedies and identity of issues necessary for res judicata is absent when the two laws have not

been similarly interpreted and whether Title VII will still be available as a remedy to litigant even after state proceedings have been completed.

VII. THE SUPREME COURT HONORS REQUEST PURSUANT TO RULE 15(a) THAT LEAVE OF COURT BE OBTAINED FOR THE AMENDMENT OF PLEADINGS, IN SUCH SITUATIONS "LEAVE SHALL BE FREELY GIVEN WHEN JUSTICE SO REQUIRES" AND "THIS MANDATE IS TO BE HEEDED," AS IN THE SUPREME COURT IN *FOREMAN V. DAVIS* (1962).

Pursuant to Rule 15(a) a party may amend pleadings "once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which responsive pleading is permitted and the action has not been placed upon the trial calendar. An amended complaint may be filed without seeking leave of court or agreement of counsel. An opportunity to TEST claims on the Merits of the underlying facts and circumstances may be a proper subject of relief.

Rule 15(a)'s provision for amendment of pleadings prior to trial provide an offer up of evidence for trial purposes. Since the statute of limitations has run on Petitioner's motor vehicle accident of September 25, 1986 claim, the Petitioner can show in an amended complaint that the new claim relates back to the date of the original complaint.

In Rule 15(c)(1) an amendment relates back to the date of the original pleading if "relation back is permitted by the law that provides the statute of limitations application to the action."

In Rule 15(c)(2), the claim or defense "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

In Rule 15(d), provision is made for Supplemental Pleadings. Petitioner requests amendments of pleadings to rectify errors and permit changes of her claims. These Supplemental pleadings would permit Petitioner to assert events that have

occurred since the filing of the original pleadings such as medical, disability interfering with employment, as substantiated by Social Security Disability Approval.

The Defense of Laches in a suit for Specific Performance is to be considered wholly independent of the Statute of Limitations.

The assertion of a claim under 28 U.S.C. §1331 may permit the court to exercise Supplemental Jurisdiction over related claims pursuant to 28 U.S.C. §1367.

VIII. THE FEDERAL DOCTRINE OF EQUITABLE TOLLING APPLIES IN A CIVIL RIGHTS ACTION UNDER 42 U.S.C.A. §1983 WHEN A BORROWED STATE STATUTE OF LIMITATIONS DOES NOT TOLL THE STATUTE DURING PERIODS OF INCOMPETENCY OR DISABILITY AND NOT FOLLOWING THE STATE STATUTE WILL DEFEAT THE GOALS OF §1983 AND EFFECTIVELY DEPRIVE A CLAIMANT, WHO IS MENTALLY INCOMPETENT OR DISABLED AND HAS NO UNDERSTANDING OF HER CAUSE OF ACTION, OF ANY OPPORTUNITY TO SEEK REDRESS FOR CONSTITUTIONALLY PROTECTED CIVIL RIGHTS, AND THE STRICT ADHERENCE TO THE ANTI-TOLLING PROVISION OF THE BORROWED STATE STATUTE OF LIMITATIONS CONTRADICTS ALL OTHER STATE/TERRITORIAL TOLLING PROVISIONS AND THEREFORE WILL VIOLATE THE UNIFORM APPLICATION OF STATUTES OF LIMITATIONS IN CIVIL RIGHTS CASES.

A borrowed state statute of limitations for a federal civil rights action, pursuant to 42 U.S.C.A. §1983, must be tolled in this case of egregious abuse under the federal equitable tolling doctrines that are available to the Court, because in failing to do so, the Court will effectively deny incompetents or the disabled any remedy for violation of their federal civil

rights. This is a matter of first impression before this Honorable Court. However, this Honorable Court has previously stated that:

> When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so. *Wilson v. Garcia,* 471 U.S. 261, 266, 105 S.Ct. 1938 (1985).

This Court has further held that "Courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.' " *Garcia* at 268-271. In addition, this Honorable Court has also held that,

> State Legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. *Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355, 367 (1977).

Congress intended that "gaps in federal civil rights acts should be filled by state law," *Hardin v. Straub,* 490 U.S. 536, 538, 109 S.Ct. 1998, 2000 (1989), but only "as long as the law is not inconsistent with federal law" and does not defeat §1983's "chief goals of compensation and deterrence." *Id.* at 538-39, 109 S.Ct. at 2001. *See also Board of Regents v. Tomanio,* 446 U.S. 478, 64 L.Ed.2d 440, 100 S.Ct. 1790 (1980).

The second federal policy underlying §1983 Civil Rights actions in addition to deterrence is compensation for the victim who has suffered a violation of her civil rights. In the present case, Petitioner has suffered permanent injuries from an automobile accident of September 25, 1986. According to the federal policies underlying §1983, Petitioner should be compensated for suffering these constitutional deprivations. If this Honorable Court does not toll the statute of limitations, the Petitioner will not only have suffered egregious abuse, but

she will also be denied her federal rights under the United States Constitution.

Wisconsin does toll its statute of limitations for incompetency or disability. (See statutory provisions, Appendix A at p. A61.) Therefore, Wisconsin does not deprive incompetent or disabled any opportunity to vindicate their civil rights.

A body of state tolling law that lacks a provision for equitable tolling is inconsistent with the provision of a complete federal remedy under §1983 and therefore should be overridden by the federal equitable tolling doctrine.

IX. FEDERAL COURTS APPLY THE BORROWED STATE STATUTE OF LIMITATIONS FOR PERSON INJURY ACTIONS IN A 42 U.S.C.A. §1983 CASE, ACCORDING TO THE FEDERAL COMMON LAW AND BY NOT FOLLOWING THE STATE STATUTE WILL DEFEAT THE GOALS OF §1983 AND EFFECTIVELY DEPRIVE THE CLAIMANT, WHO IS DISABLED, OF ANY OPPORTUNITY TO SEEK REDRESS FOR DEPRIVATIONS OF HER UNITED STATES CONSTITUTIONALLY PROTECTED RIGHTS AND THE STRICT ADHERENCE TO THE ANTI-TOLLING PROVISION OF THE BORROWED STATE STATUTE OF LIMITATION CONTRADICTS ALL OTHER STATE/TERRITORIAL TOLLING PROVISIONS AND THEREFORE WILL VIOLATE THE UNIFORM APPLICATION OF STATUTES OF LIMITATIONS IN CIVIL RIGHTS CASES.

This Court has a well established tradition of protecting the uniform application of borrowed state statutes of limitations in §1983 actions. *Wilson v. Garcia,* 471 U.S. 261, 275, 105 S.Ct. 1468, 64 L.Ed.2d 15 (1980). According to the federal common law, federal courts apply the borrowed state statute of limitations for personal injury actions in a §1983 case. *Wilson* at 279. This system is intended to guarantee the uniform application of such statutes of limitations. This Honorable Court has stated:

> (The) federal courts may . . . fashion their own limitations periods whenever a state statute of limitations threatens a federal program's need for uniformity. *Eubanks v. Clarke,* 434 F.Supp. 1022, 1031 (E.D. Pa. 1977) citing *United Auto Workers v. Hoosier-Cardinal Corp.,* 383 U.S. 696, 86 S.Ct. 1107 (1966).

Wisconsin has explicit statutory provisions which toll the statute of limitations during periods of incompetency or disability. See Appendix A p. A61.)

Since the Petitioner resided in Wisconsin, her ability to vindicate her civil rights would be protected during her incompetency or disability. The protection of the disableds' civil rights during periods of disability does result in the uniform application of federal civil rights law and does not defeat §1983's chief goals of deterrence and compensation.

If the United States Supreme Court does not grant Certiorari, it will effectively deny Petitioner her Constitutional and Civil Rights. It is incomprehensible that the Court would refuse to exercise its federal equitable tolling powers to avoid this unjust result. Such an outcome would directly contradict the decision in *Wilson v. Garcia,* supra, where the Supreme Court of the United States quite clearly recognized the need for uniformity in statute of limitations questions in dealing with §1983 actions.

Petitioner contends that this Honorable Court should not condone such a blatant discrimination and the resulting lack of uniformity which would result by failing to equitably toll Wisconsin's statute. The Supreme Court in *Wilson v. Garcia,* supra, sought to bring §1983 actions into a state of uniformity in the application of statutes of limitations. In determining how to apply the state statutes of limitations, the Supreme Court stated,

> When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so. *Wilson,* at 266.

The Supreme Court further stated, "Courts are to apply state law only if it is not inconsistent with the Constitution and laws of the United States." *Wilson*, at 266.

In the opinion of this Honorable Court in *Wilson*, supra, it is clear that federal courts seek uniformity in the application of the borrowed state statutes of limitations. The Court determined in *Wilson*, supra, that uniformity could be achieved by applying the state's personal injury statutes of limitations to all §1983 actions.

This Honorable Court should grant Certiorari to promote uniformity in the application of the borrowed state statutes of limitation.

The Seventh Circuit Court of Appeals affirmed the decision of the Western District Court of Wisconsin which adopted the opinion of Judge John C. Shabaz, and by doing so, failed to apply the federal doctrine of equitable tolling in §1983 Civil Rights Actions. As such, the Seventh Circuit decision directly conflicts with the decision of the Seventh Circuit of Appeals in *Heck v. Humphrey*, 997 F.2d 355 (7th Cir. 1993), *cert. granted*, U.S., 114 S.Ct. 2364 (1994) In *Heck*, the Seventh Circuit recognized that,

> . . . the Supreme Court has held that state, not federal, tolling provisions apply to state statutes of limitations borrowed for §1983 suits. *Heck* at 358. (citing *Tomanio* and *Hardin*).
>
> The Seventh Circuit determined that:
>
> Neither Tomanio nor Hardin, however, dealt with a situation in which a federal tolling doctrine was essential to the vindication of federal rights. Congress . . . intended that "gaps in federal civil rights acts should be filled by state law," *Hardin v. Straub*, supra, 490 U.S. at 538, 109 S.Ct. at 2000, but only "as long as that law is not inconsistent with federal law" and does not defeat §1983's "chief goals of compensation and deterrence." *Id.* at 538-39, 109 S.Ct. at 2001 . . . it follows that a body of state tolling law that lacks a provision for equitable tolling is inconsistent with the provision of a complete

federal remedy under §1983 and therefore is overridden by the federal doctrine. *Heck* at 358.

On Petition for Certiorari, the Supreme Court indicated that the Seventh Circuit Court of Appeals "concluded that a federal doctrine of equitable tolling would apply to the 1983 cause of action" under the facts of that case. *Heck* at S.Ct. 2373. The Supreme Court decision stated that the Seventh Circuit Court of appeals distinguished the Supreme Court cases holding that state, not federal, tolling provisions apply in §1983 actions. The Supreme Court did not indicate that the Seventh Circuit Court of Appeals was incorrect in applying the federal equitable tolling principle or that it was improper to distinguish the Supreme Court decisions. The Supreme Court comments, although only dicta, could be interpreted in a manner which would recognize the application of the federal doctrine of equitable tolling in §1983 actions under the present circumstances. The Supreme Court has not provided direct guidance on this issue, since this was dicta and not part of the holding of the case. Therefore, the conflict between the Courts of Appeals continues to exist. Certiorari should be granted to resolve this conflict.

The Supreme Court held that this section extends protection to former employees according to 42 U.S.C. §2000e-3, in *Robinson v. Shell Oil Company,* 117 S.Ct. 843 (72 FEP Cases 1856) (1997).

In citing *General Telephone Co. v. EEOC,* 446 U.S. at 326, the EEOC acts not only on behalf of private parties but also "to vindicate the public interest in preventing employment discrimination." The First Circuit reasoned that "public policy clearly favors the free flow of information between victims employment discrimination and the agency entrusted with righting the wrongs inflicted upon them." 94 F.3d at 745. Thus, "any agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest." *Id.* at 744.

X. CONGRESS ENACTED PROVISIONS BARRING RETALIATION IN EACH OF THE STATUTES ENFORCED BY THE COMMISSION IN LARGE PART TO ENSURE THAT EMPLOYEES REMAIN FREE TO REPORT SUSPECTED VIOLATIONS TO THE GOVERNMENT.

A strong public interest also prohibits interference with the right to file a charge with EEOC. The Commission relies on charges not only as its principal source of information regarding unlawful conduct, but also, in the case of Title VII and the ADA, as a statutory prerequisite for its investigations and proceedings. 42 U.S.C. §2000e-5(b); 42 U.S.C. §12117(a) (ADA section incorporating Title VII procedures). Under the ADEA and EPA, the Commission is empowered to investigate without a charge 29 U.S.C. §626(a) (ADEA) and 29 U.S.C. §211 of the Fair Labor Standards Act (FLSA).

The primary purpose of a charge of discrimination filed with the EEOC is to "place the EEOC on notice that someone . . . believes that an employer has violated one of the anti-discrimination statutes." *EEOC v. Shell Oil Co.*, 466 U.S. at 68; see also *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1089 (44 FEP Cases 569) (5th Cir. 1987). This notice to the EEOC serves to trigger law enforcement proceedings by the EEOC that include an investigation and, if there is a finding of discrimination, may include conciliation and litigation. Thus, every charge filed with the EEOC carries two potential claims for relief: the charging party's claim for individual relief, and the EEOC's claim "to vindicate the public interest in preventing employment discrimination." *General Telephone Co. v. EEOC*, 446 U.S. at 326.

CONCLUSION

Petitioner has not failed to establish credible evidence in the record that she is disabled under the ADA. Summary judgment should not dismiss Petitioner's ADA claims. The Petitioner's ADEA claims were filed timely and are within the scope of her EEOC charges and identified numerous

adverse employment actions motivated by discriminatory animus on account of Petitioner's age. Accordingly, Petitioner believes that her ADEA claims should not be dismissed. Petitioner established a prima facie case of retaliation against her for filing claims with the EEOC because of numerous adverse employment actions had been shown. In addition, Petitioner also showed direct evidence as well as indirect evidence that Respondent intentionally took retaliatory action against her in violation of Title VII of the Civil Rights Act of 1964, as amended. Petitioner's claims also relate to WEAC Labor Union, Blount, and Burke in regards to breaching their duty of fair representation as her collective bargaining representatives.

Petitioner was aware of "no" good faith efforts on Respondent's part in consulting with Petitioner who had on numerous occasions informed covered entity that accommodations were needed to make a reasonable accommodation that would have provided Petitioner with an equally effective opportunity and would not have caused Respondent undue hardship. In Section 501, a Jury Trial is available when damages are sought for intentional discrimination.

Attorney's fees are also available to Petitioner who prevails on her claim for damages under the Civil Rights Act of 1991 including: Expert Fees, at the Court's discretion.

Four major Federal Laws prohibit Employment Discrimination against persons with Disabilities: Sections 501, 503 and 504 of the Rehabilitation Act (29 U.S.C.A. §§791, 793, 794) and the ADA.

The material facts underlying the issues raised by Petitioner are in dispute and the Court may decide the issues at law raised by the Petitioner.

Since there are still questions of fact that have to be determined regarding alleged discrimination and retaliation, it appears that summary judgment did not get at the facts per se. Therefore, a trial is needed to substantiate the disputed facts.

Summary judgment to be granted for Respondent's counterclaim that where the genuine issues of fact that existed and

still continues to exist is irrelevant and immaterial appears to be incorrect since it assists in determining whether a violation of the applicable Federal Act has occurred.

It is Petitioner's understanding that the Summary Judgment is not a substitute for a Court or Jury Trial of any issue of material fact that is the subject of a genuine dispute. See 56.04(1), 56.15(1), 56.17(18), 56.18, 56.19, 56.20.

In this case, Petitioner has provided sufficient evidence to defeat Respondent's motion for summary judgment. Specifically, the affidavits and supporting documentation offered up by Petitioner has raised material issues of fact. Thus, the district court improperly granted Respondent's summary judgment motion, as well as the Seventh Circuit Court of Appeals affirmation of the district court decision, and this Honorable Court must reverse those decisions.

For the foregoing reasons, Petitioner respectfully prays that her writ of certiorari be granted.

Respectfully submitted,

SANDRA LEA BENEDICT
Pro Se Litigant
3642 Livingston Lane
Eau Claire, Wisconsin 54701

Date: December 17, 1999

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted August 19, 1999
Decided August 23, 1999

Before

Hon. RICHARD A. POSNER, *Chief Judge*

Hon. JOEL M. FLAUM, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

No. 98-3437

SANDRA L. BENEDICT,
Plaintiff-Appellant,
v.
EAU CLAIRE PUBLIC SCHOOLS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 98-C-313-S
John C. Shabaz,
Chief Judge.

ORDER

Sandra Benedict has flooded this court with numerous and voluminous filings relating to her appeal of the district court's judgment in favor of the defendants in this civil rights case. Benedict has been employed by the Eau Clair Public Schools since 1972, but has been on disability leave since 1997. Her disability arises out of injuries she suffered in a car accident in 1986. In 1995, she

sued the Eau Claire Public Schools alleging discrimination against her in violation of the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA). Ultimately, she lost that case and we affirmed. *See Benedict v. Eau Claire Public Schools*, No. 97-2513, 1998 WL 60374, (7th Cir. Feb. 10, 1998) (unpublished order), *cert. denied*, 119 S.Ct. 58 (1998). Her current complaint alleges further ADA and ADEA violations by the school district and the Wisconsin Education Association Council (WEAC), a teacher's union to which Benedict belonged. Benedict also names as defendants WEAC's counsel, John Finerty; two lawyers who represented her at points during her 1995 discrimination suit, Victor Arellano and John Arnot; and two lawyers who represented her during successful litigation arising out of the 1986 auto accident, Thomas Guelzow and George Senteney. The district court dismissed the claims against the various lawyers because the complaint did not contain any allegations against them, and later granted summary judgment to the school district and WEAC. We affirm.

We begin by noting that Benedict's sprawling opening brief contains no argument relating to the district court's dismissal of attorneys Finerty, Arellano, Arnot, Guelzow and Senteney. Although Benedict attempts to respond to the dismissal in her reply brief, this is too late. Benedict forfeited any argument against the dismissal by failing to include one in the opening brief. *See, e.g., Georgou v. Fritzshall*, 178 F.3d 453, 456 (7th Cir. 1999). In addition, WEAC was not named in Benedict's EEOC charge and therefore Benedict cannot maintain her discrimination suit against the union, either. *See Noreuil v.*

Peabody Coal Co., 96 F.3d 254, 258 (7th Cir. 1998). Benedict's claims against the school district are similarly futile. Most of Benedict's brief is devoted to relitigating issues related to her prior case against the school district. Therefore, claim preclusion bars her from raising these arguments. *See DiGiore v. Ryan*, 172 F.3d 454, 466 (7th Cir. 1999). The only new claim Benedict raises in this suit is the allegation that the school board discriminated against her by delaying eight months in awarding her a commemorative length-of-service plaque. Normally, the school district gives these plaques to teachers at staff meetings, but because Benedict was out on disability leave at the time she finished 25 years of service, her school decided to mail the award to her. According to the school district's unrebutted proposed findings of fact, the person who was to mail the plaque then forgot about it for several months before remembering to mail it. This claim fails because the failure to get the plaque to Benedict on time is not an adverse employment action, which is a required element of both Benedict's ADEA and ADA claims. *See Roberts v. Separators, Inc.*, 172 F.3d 448, 451 (7th Cir. 1999) (ADEA), *Foster v. Arthur Anderson, LLP*, 168 F.3d 1029, 1032 (7th Cir. 1999) (ADA).

Finally, Appellees Arellano, Arnot, Guelzow and Senteney have filed separate motions for sanctions pursuant to Federal Rule of Appellate Procedure 38. Benedict responded to the motions with her own Rule 38 motion for sanctions against the appellees. Benedict's motion is DENIED. This appeal is patently frivolous, and Rule 38 sanctions are therefore appropriate for the appellees. The appellee's motions for sanctions are GRANTED. Appellees Arellano, Arnot, Guelzow and Senteney should file,

within 14 days, a statement of the legal expenses and other costs reasonably incurred in defending this appeal. Moreover, we order Benedict to show cause within 14 days of this order why she should not be forbidden to file any other suit (other than a habeas corpus petition or a criminal appeal) in the federal courts of this circuit until the sanction is paid in full. *See Support Systems Int'l, Inc. v. Mack,* 45 F.3d 185 (7th Cir. 1995).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SANDRA LEA BENEDICT,

Plaintiff,

v.

EAU CLAIRE PUBLIC SCHOOLS and WEAC,

Defendant.

ORDER

98-C-313-S

On August 7, 1998 the Court granted the motions of defendants Victor Arellano. Thomas Arnot, Thomas Guelzow, George Senteney and John Finnerty to dismiss plaintiff's complaint. The motions for Rule 11 sanctions filed by John Finnerty, Thomas Guelzow and George Senteney have been fully briefed and are ready for decision.

Rule 11(b), Federal Rules of Civil Procedure, provides as follows:

> By presenting to the court (whether by signing, filing or later advocating) a pleading, written motion, or other paper an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –
>
> . . .
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension,

> modification, or reversal of existing law or the establishment of new law:

In her complaint filed in this Court plaintiff did not allege any actions by defendants John Finnerty, Thomas Guelzow or George Senteney. There is no basis in either law or fact for her claims against them. As Finnerty states in his brief:

> To say that Benedict has taken a scatter-gun approach to this case, in suing any and all individuals she can identify, is an understatement. I got caught, needlessly, in the cross-fire.

This needless and frivolous litigation is the type that Rule 11 intends to deter.

Finnerty notified plaintiff by letter that there was no legal basis for the complaint against him. He also notified her pursuant to Rule 11(c)(1)(A), Federal Rules of Civil Procedure, of his intent to file a motion for sanctions. Finnerty requests sanctions in the amount of $2730.00, attorneys' fees incurred in prosecuting the motion to quash plaintiff's subpoena and dismiss her case. Plaintiff has filed no opposition to the motion. The fees are reasonable and Finnerty's motion for sanctions in this amount will be granted.

Pursuant to Rule 11(c)(1)(A), Guelzow and Senteney notified plaintiff on July 9, 1998 of their intent to file a motion for sanctions. On August 20, 1998 Guelzow and Senteney requested Rule 11 sanctions in the amount of $4,959.95 for attorneys' fees incurred in defending against plaintiff's complaint. Plaintiff filed no opposition to the motion. The requested fees are reasonable and the motion

of Guelzow and Senteney for sanctions in this amount will be granted.

ORDER

IT IS ORDERED that defendant John Finnerty's motion for sanctions is GRANTED and that sanctions are awarded to him from plaintiff in the amount of $2,730.00.

IT IS FURTHER ORDERED that the motion of defendants Thomas Guelzow and George Senteney for sanctions is GRANTED and that sanctions are awarded to them from plaintiff in the amount of $4,959.95.

Entered this 9th day of September, 1998.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

SANDRA LEA BENEDICT,

Plaintiff(s),

v.

EAU CLAIRE PUBLIC SCHOOLS, WEAC LABOR UNION, VICTOR ARELLANO, THOMAS ARNOT, THOMAS GUELZOW, GEORGE SENTENEY and JOHN FINNERTY,

Defendant(s).

JUDGMENT IN A CIVIL CASE

Case No.: 98-C-313-S

(Filed Sep. 10, 1998)

This action came for consideration before the court with DISTRICT JUDGE JOHN C. SHABAZ presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS ENTERED IN FAVOR OF DEFENDANTS EAU CLAIRE PUBLIC SCHOOLS, WEAC, VICTOR ARRELLANO, THOMAS ARNOT, THOMAS GUELZOW, GEORGE SENTENEY AND JOHN FINNERTY AGAINST PLAINTIFF DISMISSING HER COMPLAINT AND ALL CLAIMS CONTAINED THEREIN WITH PREJUDICE AND COSTS EXCEPT

THAT HER STATE LAW CLAIMS AGAINST WEAC ARE DISMISSED WITHOUT PREJUDICE.

Approved as to form this 9th day of September, 1998.

/s/ John C. Shabaz
JOHN C. SHABAZ
DISTRICT JUDGE

/s/ Joseph W. Skupniewitz
Joseph W. Skupniewitz, Clerk

by Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
120 N. HENRY ST., #320
POST OFFICE BOX 432
MADISON, WISCONSIN 53701
(608) 264-5156

TRANSCRIPT OF JUDGMENT

CASE NUMBER:	98-C-0313-S
JUDGMENT DEBTOR:	BENEDICT, SANDRA LEA
JUDGMENT CREDITOR:	FINNERTY, JOHN
Sanctions	$2730.00
DATE INDEXED:	September 10, 1998
JUDGMENT CREDITOR:	GUELZOW, THOMAS
Sanctions	$4959.95
DATE INDEXED:	September 10, 1998
JUDGMENT CREDITOR:	SENTENEY, GEORGE
Sanctions	$4959.95
DATE INDEXED:	September 10, 1998

I, JOSEPH W. SKUPNIEWITZ, Clerk of the U.S. District Court for the WESTERN DISTRICT OF WISCONSIN, certify that I have compared the foregoing with the original judgment index now on record in this office, that it is a correct transcript of the judgment now on file in Case Number 98-C-0313-S.

IN TESTIMONY WHEREOF, I have hereto, subscribed my name and affixed the seal of this court at MADISON, WISCONSIN on September 18, 1998.

JOSEPH W. SKUPNIEWITZ,
CLERK

/s/ LuAnn Kampen
DEPUTY CLERK

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITHOUT ORAL ARGUMENT

Date: August 23, 1999

BEFORE: Honorable RICHARD A. POSNER,
Chief Judge

Honorable JOEL M. FLAUM,
Circuit Judge

Honorable ILANA DIAMOND ROVNER,
Circuit Judge

No. 98-3437

SANDRA L. BENEDICT,

Plaintiff – Appellant

v.

EAU CLAIRE PUBLIC SCHOOLS, WEAC LABOR UNION, THOMAS GUELZOW, et al.,

Defendants – Appellees

Appeal from the United States District Court for the Western District of Wisconsin
No. 98 C 313, John C. Shabaz, Chief Judge

The judgment of the District Court is AFFIRMED, with costs. This appeal is patently frivolous, and Rule 38 sanctions are therefore appropriate for the appellees. The appellees' motions for sanctions are GRANTED. Appellees Arellano, Arnot, Guelzow and Senteney should file, within 14 days, a statement of the legal expenses and other costs reasonably incurred in defending this appeal. Moreover, the court orders Benedict to show cause within 14 days of this order why she should not be forbidden to

file any other suit (other than a habeas corpus petition or a criminal appeal) in the federal courts of this circuit until the sanction is paid in full. The above is in accordance with the decision of this court entered on this date.

(1060-110393)

United States Court of Appeals

For The Seventh Circuit
Chicago, Illinois 60604

September 20, 1999

Hon. RICHARD A. POSNER, *Chief Judge*

Hon. JOEL M. FLAUM, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

SANDRA L. BENEDICT, Plaintiff-Appellant, No. 98-3437 v. EAU CLAIRE PUBLIC SCHOOLS, et al. Defendants-Appellees.	)	Appeal from the United States District Court for the Western District of Wisconsin. No. 98 C-313-S John C. Shabaz, *Chief Judge*

ORDER

On consideration of the petition for rehearing filed in the above-entitled case on September 3, 1999, by plaintiff-appellant, all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

United States Court of Appeals *ss*

For the Seventh Circuit
Chicago, Illinois 60604
October 20, 1999

By the Court:

SANDRA L. BENEDICT, Plaintiff-Appellant, No. 98-3437 v. EAU CLAIRE PUBLIC SCHOOLS, WEAC LABOR UNION, THOMAS GUELZOW, et al., Defendants-Appellees.	Appeal from the United States District Court for the Western District of Wisconsin. No. 98 C 313 John C. Shabaz, Chief Judge.

The following are before the court:

1. **MOTION FOR CIR. R. 41 ISSUANCE AND STAY OF MANDATE CIR. R. 41(D), STAY OF EXECUTION OF JUDGMENT ENFORCING ADMINISTRATIVE ORDER SUBJECT TO SAME REQUIREMENT AS STAY OF MANDATE PENDING THE FILING OF A PETITION FOR CERTIORARI IN THE SUPREME COURT,** filed on October 8, 1999, by the pro se appellant.
2. **RESPONSE TO MOTION TO RECALL THE MANDATE,** filed on October 19, 1999, by counsel for appellees Thomas Guelzow and George Senteney.

IT IS ORDERED that #1 is **DENIED**.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

SANDRA LEA BENEDICT,

Plaintiff(s),

v.

WEAC LABOR UNION,

Defendant(s).

JUDGMENT IN A CIVIL CASE

Case No.: 98-C-877-S
(Filed Feb. 16, 1999)

This action came for consideration before the court with DISTRICT JUDGE JOHN C. SHABAZ presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT PLAINTIFF'S COMPLAINT IS DISMISSED WITHOUT PREJUDICE TO REFILING AFTER SHE HAS EXHAUSTED HER ADMINISTRATIVE REMEDIES.

Approved as to form this 12th day of February, 1999.

/s/ John C. Shabaz
JOHN C. SHABAZ
DISTRICT JUDGE

/s/ Joseph W. Skupneiwitz
Joseph W. Skupniewitz, Clerk

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

ORDER OF DISMISSAL

IN THE CASE OF	CLAIM FOR
Sandra L. Benedict (Claimant)	Period of Disability and Disability Insurance Benefits
(Wage Earner)	394-54-4287 (Social Security Number)

This case is before the Administrative Law Judge on the Claimant's request for hearing dated December 23, 1997. On January 21, 1998 a fully favorable revised reconsideration determination was issued finding the claimant disabled since March 21, 1997.

The revised determination advised the claimant that if he or she disagreed with the revised determination, he or she had 30 days to request that we proceed with the pending request for hearing. The claimant has not requested that we proceed with the pending request for hearing. Accordingly, pursuant to Social Security Administration regulations 20 C.F.R. §§404.941(d) and 416.1441(d), the Administrative Law Judge dismissed the request for hearing. The revised consideration determination dated January 21, 1998 stands as the final decision of the Secretary.

Notice of this action is hereby given by mailing a copy to the claimant.

/s/ Jerome J. Berkowitz
Jerome J. Berkowitz
Administrative Law Judge

Date: March 20, 1998

[SEAL]

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INSPECTOR GENERAL

NOV 22 1999

Ms. Sandra Lea Benedict
3642 Livingston Lane
Eau Claire, Wisconsin 54701

Dear Ms. Benedict:

This is in response to your letter dated September 20, 1999, requesting the assistance of the Department of Justice in your appeal of a decision by the United States District Court for the Western District of Wisconsin. Enclosed with your letter, you provided several additional documents related to your employment discrimination complaints against the Eau Claire School District (ECSD).

We have reviewed the documents you provided and are prepared to respond to any inquiries from the Department of Justice related to the ECSD Title I allegations you provided to our office. In addition, because the issues you raise are directly related to employment discrimination under the Americans with Disabilities Act, we have forwarded a copy of your documents to Ms. Norma Cantu, the Department's Assistant Secretary for the Office for Civil Rights.

For your information, Ms. Cantu's address is:

Ms. Norma V. Cantu
Assistant Secretary for the Office for Civil Rights
400 Maryland Avenue, SW
Washington, DC 20202

We hope this information is helpful to you.

Sincerely,

/s/ Steven A. McNamara
Steven A. McNamara
Assistant Inspector General
for Audit

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION

Sandra L Benedict
3642 Livingston Lane
Eau Claire, WI 54701

Complainant,

v.

Eau Claire School District
500 Main Street
Eau Claire, WI 54701

Respondent A,

and

Wisconsin Education Association Council
33 Nob Hill
Madison, WI 53713

Respondent B,

and

Eau Claire Association of Educators
2645 Harkin Street
Eau Claire, WI 54701

Respondent C,

DECISION ON MOTION TO DISMISS
ERD CASE NO. 199800825
EEOC CASE NO. 26G980501

This matter is before the Administrative Law Judge on Respondent A's (ECSD) Motion to Dismiss on the grounds of *res judicata*. The motion was filed on or about February 18, 1999 and the Complainant (Benedict) filed her response on March 13, 1999.

The complaint in this matter alleges a single act of employment discrimination. ECSD's failure to present Benedict her 25 year service award in a timely manner because of her age, disability and in retaliation for her having previously filed a discrimination complaint.

In an order dated September 9, 1998 the United States District Court for the Western District of Wisconsin granted summary judgment in the matter of *Sandra Lea Benedict v. Eau Claire Public Schools and WEAC,* case number 98-C-313-S. The court granted summary judgment in favor of Eau Claire Public Schools (ECSD in this matter) and WEAC (Respondent B in this matter) and specifically held that ECSD's failure to timely present Benedict her length of service award did not constitute an adverse employment action. Since this issue, between these parties, has been decided by a court of competent jurisdiction this tribunal is bound by that court's decision.

Sandra L. Benedict

To sustain her appeal of the no probable cause finding in this matter Benedict must show probable cause to believe she suffered an adverse employment action because of either age, disability or retaliation. Since it has been clearly and unambiguously held, by a court, the decisions of which are direct and controlling precedent for this tribunal, that the only action Benedict complains of is not an adverse employment action her claim before the Division must fail. This is *res judicata* distilled to its essence. Rarely is a conclusion so inescapable.

Benedict's arguments regarding the lack of identity of either the parties or the cause of action are completely devoid of merit and will not be individually addressed. Finally, Benedict argues that summary judgment was improperly granted in federal court and she is, therefore, entitled to a hearing before the Division. This tribunal simply does not reverse, or ignore, orders issued by federal courts. Should Benedict prevail on her appeal of the federal court's order this tribunal will act accordingly. Until then her complaint must be dismissed.

Based upon the foregoing and the record and file herein the Administrative Law Judge issues the following:

ORDER

The complaint in this matter is hereby dismissed with prejudice.

Dated at Milwaukee, Wisconsin MAR 19 1999.

/s/ Gary L. Olstad
Gary L. Olstad
Administrative Law Judge

Complainant
Respondents A, B & C
James M. Ward, Attorney for Respondent A
John D. Finnerty, Jr., Attorney for Respondent B
EEOC

ERD CASE NO. 199800825
EEOC CASE NO. 26G980501

STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
P O BOX 8126, MADISON, WI 53708-8126 (608/266-9850)

SANDRA BENEDICT,
Complainant
3642 LIVINGSTON LN
EAU CLAIRE WI 54701

EAU CLAIRE AREA
SCHOOL DISTRICT,
Respondent
500 MAIN ST
EAU CLAIRE WI
54701-3770

FAIR
EMPLOYMENT
DECISION

ERD Case No.
199701717
EEOC Case No.
26G971140

**SEE
ENCLOSURE AS
TO TIME LIMIT
AND
PROCEDURES
ON FURTHER
APPEAL**

An administrative law judge (ALJ) for the Equal Rights Division of the Department of Workforce Development issued a decision in this matter. A timely petition for review was filed.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted to the ALJ. Based on its review, the commission agrees with the decision of the ALJ, and it adopts the findings and conclusion in that decision as its own.

DECISION

The decision of the administrative law judge (copy attached) is affirmed.

Dated and mailed

January 12, 1999
benedsa.rsd:101:9

/s/ David B. Falstad
David B. Falstad, Chairman

/s/ Pamela I. Anderson
Pamela I. Anderson, Commissioner

/s/ James A. Rutkowski
James A. Rutkowski, Commissioner

MEMORANDUM OPINION

In her petition for hearing and/or petition for review, the complainant requests review of a decision of an ALJ, and review of several prior decisions. However, as explained in a letter dated November 11, 1998, the commission has the power only to review ALJ John Brown's September 28, 1998 decision in ERD Case no. 199701717.

The complainant asserts discrimination based on age and handicap, and retaliatory action for filing a discrimination complaint, which she became aware of on March

19, 1997. The complaint arises from the complainant's dealing with a co-worker, Donna Friedeck, on that date.

The complainant is a first grade teacher. Ms. Friedeck's duties include monitoring the success of reading/language arts programs. Ms. Friedeck is the complainant's co-equal; she is not the complainant's supervisor (or anyone's supervisor) under the employer's management structure. The ALJ concluded that, on March 19, 1997, after observing the complainant's class and requesting required decomentation which the complainant did not possess, Ms. Friedeck told the complainant she was upset because she believed the complainant was not following the prescribed curriculum.

The commission recognizes that the complainant's version of events differs from Ms. Friedeck's testimony. However, the ALJ, who observed the witnesses as they testified, reasonably credited Ms. Friedeck's testimony. Moreover, for the reasons carefully explained in his decision, the ALJ properly found that Ms. Friedeck's comments were not motivated by the complainant's age, handicap or prior complaints against the employer.

cc: James M. Ward

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION

Sandra L. Benedict
3642 Livingston Lane
Eau Claire, WI 54701

Complainant,

v.

Eau Claire Public Schools
500 Main Street
Eau Claire, WI 54701-3770

Respondent

DECISION AND ORDER

ERD Case No. 199701717
EEOC Case No. 26G971140

On April 21, 1997 the Complaint, Sandra L. Benedict, filed a complaint with the Equal Rights Division against the Respondent, Eau Claire Public Schools. Ms. Benedict alleged that the School District discriminated against her on the basis of age, handicap and in retaliation for earlier-filed complaints.

The complaint was assigned to an Equal Rights Officer who issued two determinations on October 27, 1997. One was a Preliminary Determination dismissing the portion of the complaint that claimed that the School District discriminated against her because she filed a complaint with the U.S. Department of Education. The other determination was an Initial Determination finding no probable cause to believe that the School District violated the Wisconsin Fair Employment Act (WFEA) in any of the other aspects alleged by Ms. Benedict in her complaint.

On November 7, 1997 the Equal Rights Division received an appeal of the Initial Determination. The Preliminary Determination, however, was not appealed and has become a final decision. The case was certified for a hearing on whether probable cause existed to believe that the School District discriminated against Ms. Benedict because of her age, handicap or in retaliation for previous complaints.

The hearing was held in Eau Claire, Wisconsin on April 16, 1998 before Administrative Law Judge John L. Brown. Ms. Benedict was present and represented herself without an attorney. The School District was present and was represented by attorney James M. Ward of the law firm Weld, Riley, Prenn & Ricci of Eau Claire, Wisconsin. The evidentiary record was closed on April 16, 1998 and the parties submitted post-hearing briefs. The briefing period ended on July 6, 1998 and this case has been ready for decision since that date.

Based on the evidence received at the hearing, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Sandra Benedict's date of birth is August 4, 1949.

2. Ms. Benedict was handicapped within the meaning of the Wisconsin Fair Employment Act (WFEA) at all times relevant to this complaint.[1]

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[1] This finding of fact is based on the following stipulation between the parties: "That for the limited purpose of this probable cause hearing Respondent stipulates that Ms. Benedict is handicappted within the meaning of the WFEA."

3. The event at issue in this complaint took place on or about March 19, 1997.

4. By March 19, 1997, Ms. Benedict had filed two previous complaints against the Eau Claire Area School District – ERD Case No. 199401912, filed on or about May 20, 1994, and ERD Case No. 199504328, filed on or about October 12, 1995.[2]

5. Ms. Benedict was employed at the Eau Claire Area School District during the 1996-1997 school year as a first grade reading teacher assigned to the Lincoln Elementary School. The position was federally funded, and was referred to as a Title I position.

6. Ms. Benedict's supervisors in this position were Richard St. Arnauld, the school principal, and Rick Savolainen, the Title I Director.

7. A woman named Donna Friedeck was also a Title I-funded employee of the Eau Claire Area School District during the 1996-1997 school year. Her job title was Elementary Reading/Language Arts Resource Teacher. Her job involved monitoring the success of the reading/language arts programs at grades K-5 in the schools within the district. The objectives of her job, as stated in her job description, were as follows:

> The elementary reading/language arts resource teacher is responsible for monitoring the success of the reading/language arts programs at grades K-5 in the schools to which that teacher has been assigned. Position objectives include working with teachers to help them improve the quality of the program within the framework of the language arts curriculum, providing

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[2] This finding of fact is based on administrative notice.

resources to be used with students at these grades, coordinating staff development with the K-12 reading and language arts coordinators, and providing diagnostic assessment with a prescriptive plan for students when needed.

8. In carrying out her duties Ms. Friedeck met periodically with the reading teachers, including Ms. Benedict, and periodically observed the reading instruction given by the teachers, including the instruction given by Ms. Benedict. The teachers, including Ms. Benedict, had a duty to track their students' progress in quarterly reports, and to share those reports with Ms. Friedeck when requested.

9. At no time did Ms. Friedeck have supervisory authority over Ms. Benedict. They were co-workers.

10. On March 19, 1997 Ms. Friedeck was aware that several years prior to 1997 Ms. Benedict had been in a car accident; she knew that Ms. Benedict had requested and received a special chair at school; and she knew that Ms. Benedict had had some difficulty climbing stairs since the date of her car accident. She had never, however, been privy to any medical information about Ms. Benedict, and did not believe, on March 19, 1997, that Ms. Benedict was suffering from any handicap or disability that limited her capacity to perform her job or that made achievement unusually difficult.

11. On March 19, 1997 Ms. Friedeck did not know Ms. Benedict's age.

12. On March 19, 1997 Ms. Friedeck was not aware that Ms. Benedict previously had filed employment discrimination complaints against the school district.

13. In the morning on March 19, 1997 Ms. Friedeck observed Ms. Benedict's reading class as part of the normal duties of her job. On a previous day Ms.

Friedeck has asked Ms. Benedict for the latest quarterly reports on her children, but Ms. Benedict did not have them ready. This concerned Ms. Friedeck.

14. After observing Ms. Benedict's class for a while, Ms. Friedeck made an appointment to confer with Ms. Benedict at about 12:30 that afternoon. Ms. Benedict said that at that time she would give Ms. Friedeck the quarterly reports she had requested.

15. At 12:30 p.m. Ms. Friedeck and Ms. Benedict met. Ms. Benedict had some, but not all of the reports Ms. Friedeck had requested. Ms. Friedeck expressed her concern to Ms. Benedict about the missing reports. Ms. Friedeck went on to tell Ms. Benedict that she was concerned that her students were not going to be ready for second grade, based on the performance she had observed that morning. She told Ms. Benedict that she was upset with her because she believed Ms. Benedict was not following the prescribed curriculum of the program.

16. Ms. Friedeck's statements to Ms. Benedict on March 19, 1997 reflected her own opinion of Ms. Benedict's efforts and were not derived in any way from any supervisors' opinions about Ms. Benedict. Ms. Friedeck's statements were motivated entirely by her devotion to carrying out her duties as described in her job description . Not only was Ms. Friedeck not motivated by Ms. Benedict's age, handicap, or prior complaints against the school district, she was not even aware of any of these factors.

17. Within two or three days of the incidents on March 19, 1997, Ms. Benedict voluntarily began an extended absence from her job at the school district.

Based on the Findings of Fact made above, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Eau Claire Public Schools (also known as the Eau Claire Area School District) was an employer of Sandra Benedict under the Wisconsin Fair Employment Act (WFEA).

2. Ms. Benedict was an individual entitled to the protections of the WFEA.

3. Ms. Benedict has not shown probable cause to believe that the Eau Claire Public Schools violated the WFEA in any respect on the basis of her age, her handicap (now referred to in the WFEA as "disability"), or in retaliation for her having made a previous complaint under the WFEA.

Based on the above Findings of Fact and Conclusions of Law, the Administrative LAw Judge issues the following:

ORDER

That the complaint in this matter is dismissed.

Dated at Milwaukee, Wisconsin SEP 28 1998

/s/ John L. Brown
John L. Brown
Administrative Law Judge

cc: Sandra L. Benedict, Complainant
Eau Claire Public Schools, Respondent
James M. Ward, Attorney for Respondent
EEOC